

**MORAL HAZARD IN INTERNATIONAL
DISPUTE RESOLUTION**

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**Inaugural Lecture as Holder of the
Michael R. Klein Distinguished Scholar Chair
University of Miami School of Law
29 April 2010**

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Members of the judiciary, faculty colleagues; students, family and friends;
it is a great honour for me to salute your kind presence at my investiture as the holder of the
Michael Klein Chair.

Your presence here gives tangible expression to your support for the law school and
your desire to help secure a bright future for it.

Those who have the good fortune of being offered a university chair do not always
have the privilege of encountering the eponym. An eponym, may I say for those who may
have forgotten, is "a person or mythical character for whom something is named". Michael
Klein, may I say for those who do not know, *is* a mythical character – but he is here today, in
flesh and bone, and I salute his precocious generosity, which has taken so many varied and
inspired – indeed *inspiring* – forms. Here at Miami Law, I like to feel that I have joined him
in a joint venture of motivating future scholarship in the service of the international
community.

The prestige of a Chair is a function of the quality of those who hold it. For that, I
hope you understand, Michael, we shall have to rely on my successors. When should we
revisit the matter? Fifty years ago, Soia Mentschikoff, then at the University of Chicago and
soon to heed the lure of Miami, became interested in the legal problems of international
arbitration. It has turned out to be a field of remarkable expansion and innovation, yet still
today, I would venture, far from its apotheosis. So let us meet again and sit here together
another 50 years hence, in the spring of 2060, and see what has become of your gift. But for
now, please allow me to introduce my subject: moral hazard in the legal resolution of
international disputes.

* * *

Two years ago, Professor Oxman stood here and delivered his extraordinary Hausler Chair Lecture on "The United States and the Future of International Law". He was deeply concerned with the fact, as he so eloquently put it, that "the constituent elements of the international legal system, and our engagement with it, are more fragile than many of us would prefer to believe." He invited us to perceive international law as "a resource to be used to further substantive objectives by endowing certain propositions with legitimacy and a sense of obligation." Professor Oxman was viewing our world from the perspective of the legal eagle that he is. What you hear from me today is intended to be a call to improve one element of the system, so as to enhance global engagement with it, so that our common objectives can be more effectively pursued *because our institutions are legitimate*.

None of us is likely to accept an unfavorable decision as legitimate if we believe it to be the product of arbitrariness or bias. Let us consider the implication of this observation – and I mean *global* implications.

For humanity to feed itself, international cooperation is indispensable. Cooperation does not mean gifts and subsidies. Cooperation means macroeconomically significant behaviour, from innovation and investment to transportation and distribution. All of this presupposes that it is reasonable to extend credit, that laws and contracts and institutions are reliable. That is how a poor country can access technology or infrastructure that might multiply agricultural yields, using *future* revenues from *anticipated* surplus harvests to pay for it. Ultimately, if there is no faith in the legitimacy of adjudication – which we all surely accept as better than violence or corruption – suppliers of goods, services, and know how will prefer to disengage. And that would be most unfortunate, because we have a powerful instrument, namely the New York Convention for the Enforcement of Arbitral Awards, often referred to as the most important legal instrument in the history of international economic exchanges, by which 142 states have undertaken to enforce arbitral awards as though they were final judgments of their own highest courts. This means that any single person in this room, without holding a judicial office, without having any legal training, simply by virtue of being appointed sole arbitrator, could render an award which has greater international effect than decisions of nine unanimous Justices of the US Supreme Court. Court judgments simply do not travel as well internationally as arbitral awards do. The US, for one, is not party to a single bilateral treaty for the enforcement of court judgments.

Now consider the spectre of war. For humanity to avoid destroying itself fighting over scarce resources, conciliation is indispensable. The ultimate reconciliation, when all else fails – and assuming once again that we reject violence and corruption – is the peaceable acceptance of an adverse decision, for example the location of a boundary or the existence of water rights. If there is no faith in adjudication, what will inhibit the urge to fight on?

Addressing moral hazards in the process of international adjudication as we know it today, I am equally concerned with international judges and international arbitrators. We *could* fix the problem by creating better human beings. Or we could remove the moral hazards. I am inclined to try the second approach, and I have an idea. What I propose seems to put me in a minority of one, judging by the rather uniform reactions to my occasional public utterances on the topic. But these reactions, I believe, are based on comfort in the

status quo – not on analysis. So I intend to soldier on, and expect to find myself in the majority well before 2060.

An American lawyer won the Nobel Peace Prize in 1912 for his promotion of arbitration. He was Elihu Root, an international lawyer, statesman, and diplomat. He first came to national prominence in the McKinley administration as Secretary of War, in which capacity he established the U.S. Army War College and the General Staff. In 1905, he succeeded John Jay as Secretary of State. The Hague Peace Conference was perhaps his great passion; he was its notable and ardent promoter. He was a true believer in international arbitration, instrumental in the establishment of the Permanent Court of Arbitration in 1899. He later became the first president of The Carnegie Endowment for International Peace, the first President of the American Society of International Law, the founding Chairman of the Council on Foreign Relations, and a member of the commission which in 1920 drafted the Statute of the Permanent Court of International Justice, the PCIJ, as the World Court was then known. He was a busy, accomplished, and worthy man. And when the time came for the inevitable two-volume biography to be written about him, its author was none other than Philip Jessup – another name that resonates among international lawyers.

Now Root had urged the creation of a permanent international court from the early years of the new 20th Century. World War I proved to be both a tragic interruption and a stimulus to establishing the PCIJ in 1922. Root was one of the 10 eminent persons asked in 1920 by the Secretary General of the new League of Nations to serve on the Commission which drew up the Statute of the PCIJ.

Root strenuously opposed the idea that judges should be named by governments. “He thought it of the utmost importance,” wrote Jessup,¹ “that the judges should be selected solely on the basis of eminent qualification for the office and not for political reasons.”

We might wonder how heavily Root’s attitude was influenced by his experience 17 years earlier, as arbitrator in the Alaskan Boundary case which was submitted by a treaty in 1903 to a tribunal of six “impartial jurists of repute”. You need to understand that the Alaskan Purchase of 1867 had taken place without a proper title search. Some documents suggested that Great Britain had in 1825 promised Russia a 10-mile strip along the entire Coast north of Prince of Wales Island. But other documents put that in doubt. No one had much cared until lumber, fish and especially gold – Klondyke! – came into the picture. At any rate, note that the tribunal was comprised of six members, three nominated by each government: the US and Great Britain. One of the Americans, Henry Cabot Lodge, was in Jessup’s words “known as a rabid Anglophobe”; another, George Turner, was a former Senator from the State of Washington, who obviously had an acute interest in the nearby boundary and was given to making public speeches endorsing the American position.² The Canadian Premier, Sir Wilfried Laurier, objected that these two were not “impartial jurists of repute”. President Roosevelt was not only unimpressed, but apparently incensed at the mere suggestion that the American thesis was open to doubt. He immediately took his pen and wrote “personal and confidential” instructions to his three “impartial jurists of repute”, giving the pretext that he “presumed” the two Canadian arbitrators shared their Premier’s views.

¹ Philip C. Jessup, *Elihu Root*, Vol. 1, 392 (1938, reprinted 1964).

² *Id.* 392.

“You will of course judge impartially... as to the exact boundary in any given locality,” he wrote, but as to “the principle involved there will of course be no compromise.”³

I surmise that Root, as he should, found this executive interference inappropriate. But he answered Roosevelt beautifully, in a sentence which that ultimate master of diplomacy, Talleyrand, would have much admired:

“In view of your dissent from the position publicly taken by Sir Wilfried Laurier, I shall refrain from assuming the correctness of that gentlemen’s statements and opinion in any consideration which I may give to the Alaskan Boundary subject in advance of the arguments of counsel.”⁴

Let us allow the possibility that this might have been a mite too subtle for Teddy Roosevelt. Perhaps as a matter of record it saved Root’s honour as a jurist. But Jessup’s research uncovered a never ending stream of further letters from Roosevelt to his “impartial jurists” pounding away at the need to win the case.

I said “two” Canadians a few moments ago. As Canadians, they were of course also British. The third British member was Lord Alverstone, the Lord Chief Justice of England. Lord Alverstone sided with the three Americans in drawing the boundary much too far eastward for Canadian tastes. Jessup does not hide the evidence that Root spent country weekends in England in the company of Alverstone while the case was pending, that Alverstone’s promising attitude was reported back to Washington, and that the First Secretary of the US Embassy in London wrote one day to Root to ask whether a hint of the “disastrous results of a failure” should not be given to the British Prime Minister, with whom he (the First Secretary) was to spend the weekend at his country seat. Still, looking back at the decision, wrote Jessup: “There is a general agreement among scholars that the American claims were sound.”⁵

Maybe so, but should that be enough? The two Canadian members of the Alaskan Boundary tribunal were livid, refused to sign the award, and issued a violent public statement affirming that they had been “compelled to witness the sacrifice of the interests of Canada.”⁶ And nowhere in Jessup’s volumes will you find the comment of the Canadian Premier, Laurier, who charged that Canada had been betrayed. Nor will you find the even more extraordinary comment by the British Prime Minister, Balfour, to the effect that the American arbitrators had “behaved ill” and were “neither judicial by position nor by character.”⁷ Balfour’s opprobrium was presumably directed at Root’s colleagues, as Root had abstained from public endorsements of the American position prior to the award. It certainly did not prevent his Nobel Prize. Still, it would have weighed on his mind, one supposes, when at the age of 75 he sat down to work on the Statute of the World Court, the PCIJ.

States were not, it seems, ready for the concept of entirely impartial arbitration. And so the drafters of the PCIJ Statute conceived the institution of the ad hoc judge, namely the

³ *Id.* 395

⁴ *Id.*

⁵ *Id.* 401

⁶ *Id.* 400

⁷ Jason Tomes, *Balfour and Foreign Policy* 184 (1997)

possibility for each disputing State to name a judge of its choice to complement the titular judges. Here is what Lord Phillimore, a member of the Privy Council and Root's colleague on the PCIJ Advisory Committee said in 1920:

“it would be preferable to give a national representative to both parties, not only to protect their interests but to enable the Court to understand certain questions which require highly specialized knowledge and relate to the differences between the various legal systems.”⁸

Think about it. It is deeply objectionable. Judges should be referred to as "representatives" of their nominees? Should “protect their interests”? Should assist the Court's understanding of “specialized” issues? Isn't that what advocates are for? Precisely – there it is: these nominees are, once we disregard pretense, a species of advocate. Yet the office of the ad hoc judge lives on in the World Court and today. It is controversial. Still, there can never be more than two ad hoc judges to sit with the 15 titular members of the Court, so the ad hocs tend to cancel each other out. A former Judge of the Court has recently reaffirmed the rationale – that ad hoc judges exist to “overcome traditional mistrust” by States of international adjudication – and opined that it really does not do much harm.⁹ So what's a little hypocrisy among friendly States? No harm, no foul? I'm not so sure. It does not strike me as setting an admirable example.

Let us now turn to international arbitration involving private parties. An unusual incident arose three years ago in a case¹⁰ conducted under the Rules of the London Court of International Arbitration before a three-member tribunal which included two unilaterally appointed arbitrators. The proceedings were reaching their end. The arbitrators had prepared their award, and were about to send it to the parties. At this point, one of the parties challenged the arbitrator nominated by its opponent on the grounds that he had violated the secrecy of the tribunal's deliberations, to the advantage of the party which had designated him, by leaking the result. As the parties were engaged in negotiations, advance knowledge of the award to be rendered was a significant advantage. The objecting party contended that the misconduct was evident in the posture of its adversary in the negotiations. How this might have been proved is an interesting question, but remained unanswered due to the fact that the challenged arbitrator, asked to comment, immediately confirmed that he had disclosed the result. The case was over, he explained blandly; why should he not inform his friend, the lawyer who had appointed him, rather than make him wait to get the award in the post? The inevitable outcome was that he had to be replaced, and a reconstituted tribunal had to reopen the case, and to some extent reprise the proceedings for the benefit of the new arbitrator.

This embarrassing incident seems less to have to do with the turpitude of the indiscreet arbitrator than with his indolence. He apparently did not bestir himself to read the rules about the secrecy of deliberations and of the proper issuance of awards; to consider that his mandate entailed duties to both sides; to think through the possible unfairness of

⁸ Lord Phillimore, *PROCESS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS* (1920), p 528-529.

⁹ Pieter Koojimans, "Article 31" in A. Zimmermann *et al.*, eds., *The Statute of the International Court of Justice* (Oxford, 2006).

¹⁰ Unpublished.

premature disclosure to one party; or to inform himself of basic expectations of conduct as an arbitrator. Although this was an incident of very bad behaviour, it was almost innocent in terms of the naïveté of the evidently inexperienced arbitrator. The troubling reality is that the extreme cases remain unknown, because improper behaviour is shrouded in urbane subterfuge and hypocrisy. It is extraordinarily difficult to police this type of behaviour. Many persons serving as arbitrator seem to have no compunction about quietly assisting “their” party; they apparently view the modern international consensus that all arbitrators own a duty to maintain an equal distance to both sides as little more than pretty words, as though sophisticates in reality conduct themselves in accordance with a different sub rosa operational code.

This leaves us with anecdotes like the one I have just recounted. An even more remarkable instance involved a prominent former U.S. federal judge who had also served in the two other branches of government, as a Congressman from Chicago and counsel in the Clinton White House. He was unilaterally appointed by the U.S. government, as an arbitrator in the infamous *Loewen* case, decided in 2003. That arbitration was brought by a Canadian inventor who complained that its treatment at the hands of American courts (specifically those of Louisiana) had breached the North American Free Trade Agreement. Loewen had received an adverse jury verdict, including \$500 million as punitive damages, arising from a \$3 million transaction, and was unable to appeal because local laws required the posting of a bond equal to 125% of the judgement – \$625 million. This case bankrupted the Canadian company. The final outcome was puzzling and controversial: an award which contained a lengthy explanation why “the conduct of the trial judge was so flawed as to constitute a miscarriage of justice” but in the concluding paragraphs snatched defeat from the jaws of a Canadian victory by declaring that the claimants lacked standing under the so-called rule of continuous nationality, the technicalities of which I will not inflict upon you. Let me just stress that it was a highly abstruse point of public international law, which the three arbitrators, most specialists agree, got quite wrong. At the time, most of us scratched our heads. But today we perhaps have the key to the mystery.

In December 2004, the American arbitrator I am referring to intervened in the course of a symposium where he reflected on his experience in *Loewen*.¹¹ The symposium happened to be recorded, and the tenor of his remarks notably made public in a law review in 2009, in a footnote that could easily be traced back to retrieve shocking verbatim remarks¹². This included the revelation that the arbitrator had met with officials of the U.S. Department of Justice prior to accepting the appointment, and that they had told him: “You know, judge, if we lose this case we could lose NAFTA.” He remembered his answer as having been: “Well, if you want to put pressure on me, then that does it.”

The words “that does it” obviously did not mean that this was the end of the matter for the prospective arbitrator. To the contrary, he accepted appointment—and did so with an apparent acknowledgement of great pressure to reach the result desired by his appointers. The Loewen corporation was thus deprived of an impartial and independent tribunal.

¹¹ Symposium on Environmental Law and the Judiciary, Pace Law School, 6-8 December 2004.

¹² Jason Webb Yackee, review of Guillermo Aguilar Alvarez and W. Michael Reisman, eds., *THE REASONS REQUIREMENTS IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES*, 103 AJIL 629, 635 (2009): “The *Loewen* award is often criticised in the investment law community as a disgraceful example of the judicial craft, but its disgracefulness becomes much more understandable when we realize the tremendous pressure that the arbitrators were under to ensure that the United States did not lose.”

Loewen was of course not informed that this dialogue had taken place. (President Clinton had been a supporter of NAFTA; the American arbitrator had served as his adviser; the conversation with the U.S. officials was to the effect that he understood that the future of NAFTA might ride on the outcome of the case. It is thus rather difficult to imagine that Loewen would have agreed to his serving on the tribunal if the facts had been disclosed.) That the matter was unlikely to have been innocent seems clear from the arbitrator's later recollections. He described himself as having been “on the dissenting side of a difficult problem” due to the fact that his fellow arbitrators were inclined to find that Loewen had been the victim of a miscarriage of justice on the part of an American court. They were Sir Anthony Mason and Lord Michael Mustill, members respectively of the highest courts of Australia and England. This account of the dynamics of the decision-making is profoundly disturbing, because the award explicitly recited that the tribunal was *unanimous*, including with respect to its conclusion that there had been egregious judicial impropriety. Yet the American arbitrator remembered himself as having been a dissenter, thus rather strongly suggesting that he had not agreed with his fellow arbitrators, but, in order to ensure that the U.S. would not lose the case, engaged in barter: going along with that conclusion of judicial impropriety in exchange for a curious technical trump card which secured an ultimate “triumph” for the U.S.

What Mason or Mustill might think of their colleague's indiscretion is anyone's guess. Should one assume that the American arbitrator, lacking experience in arbitration, acted in accordance with a vague understanding of peculiar American ideas about “non-neutral” arbitrators, appointed by each side?¹³ If so, one can only regret that he did not trouble to study the rules under which he had agreed to exercise his responsibilities; they require not only that arbitrators “exercise independent judgment”, but that deliberations among arbitrators shall – without qualification or limitation – “remain secret”.¹⁴

The example of an eminent former public official misconducting himself to such a degree, violating the basic covenants of the arbitral mission, heedless of the damage done to an important institution of the international community, cannot fail to trouble us. Let us by all means assume we are talking about someone who considers himself ethical, and who in other situations comports himself in accordance with high standards. Certainly his retrospective remarks were not in the form of a contrite confession; apparently he had no inkling that what he said would dismay arbitration practitioners. (It is hard to imagine that he would have survived a censure equivalent to that of another well known American jurist, dismissed from service in another ICSID case, *Perenco v. Ecuador*, on account of general public comments about Ecuador, not about the specific case, by a decision of the Secretary-General of the Permanent Court of Arbitration in The Hague.¹⁵) But then what was he thinking of his task as arbitrator? Was he operating on an ignorant assumption that whatever the rules may say arbitrators selected by a party are in fact advocates of their appointers? Did he stop to consider that he was putting the nail in the coffin of a successful corporation of a friendly foreign country? its employees? its shareholders? its business partners?

¹³ See David D. Branson, "American Party – Appointed Arbitrators: Not the Three Monkeys, 30 U. DAYTON L. REV. 1 (2004).

¹⁴ ICSID Additional Facility, Articles 8 and 23(1).

¹⁵ 8 December 2009, available on the Investment Treaty Arbitration website.

Certainly the example shows that inexperienced arbitrators may be a menace. Under some rules, a state would not be allowed to select one of its former high officials as its appointee; they preclude the nomination of arbitrators having the same nationality as the party. This is a step in the right direction, but far from enough; a different nationality is no guarantee of independence.

Above all, if we find such waywardness on the part of well-meaning persons, what secrets remain forever hidden under the surface of the behaviour of the unscrupulous?

The villain of this piece, if we take the American arbitrator's account as accurate, is less the arbitrator than the representatives of the U.S. Department of Justice. In this important case (allegedly of existential importance for NAFTA) they selected an inexperienced arbitrator who had spent his career as a civil servant in each branch of the very government that appointed him, put pressure on him to understand the political indispensability of winning, and failed to disclose the substance of his conclave with his appointers whether to ICSID, to his fellow panellists, or to the other party. In so doing, the bureaucrats charged with defending a particular case were subverting larger interests, namely the U.S. Government's policy of supporting an international institution of which it had always been a leading member, of upholding the terms of NAFTA in good faith, and more generally of advancing the international rule of law.

A further aspect of the conduct of the U.S. bureaucrats handling this case makes it even more difficult to condone their behaviour. Loewen's first appointee was Yves Fortier, a Canadian diplomat and former ambassador of great stature in the world of international arbitration. Fortier disclosed that his firm had merged with a much smaller firm which had previously done corporate work for Loewen. Fortier himself naturally had no involvement in that work. Yet the U.S. took exception to Fortier's continued service.¹⁶ Fortier quickly and honourably resigned. The hypocrisy of the objection is deplorable in light of what we now know of the U.S.'s relations with its own nominee.

The best way to avoid such incidents is clearly to forbid, or at least rigorously police, the practice of unilateral appointments. This would involve a significant change in prevailing practices, because the fact is that arbitrations routinely begin with each side naming an arbitrator. References are occasionally made to "the fundamental right" to name one's arbitrator.

But there is no such right. Moreover, if it existed, it would certainly not be fundamental. The original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence. Why would any party have confidence in an arbitrator selected by its unloved opponent?

We must confront an uncomfortable fact. Two recent studies of international commercial arbitrations have revealed that dissenting opinions were almost invariably (in more than 95% of the cases) written by the arbitrator nominated by the losing party.¹⁷

¹⁶ See *the Loewen Group v. U.S.*, Award of 26 June 2003, para. 21.

¹⁷ See Alan Redfern, "Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly," 2003 Freshfields Lecture, 20 *Arbitration International* 223 (2004); Eduardo Silva Romero, "Brèves

This troubling record is duplicated in the newer field of treaty-based arbitrations brought by foreign investors against states. The posture adopted by ad hoc judges in the International Court of Justice, almost invariably espousing the theses of their appointing states, has over many years been similarly inglorious – with a very few notable exceptions. (Two such exceptions were Professor Oxman, who is among us today, and Professor Jean-Pierre Cot of Paris; when they acted as ad hoc judges in *Romania v. Ukraine*, the entire Court was, for once, unanimous. I cannot even recall which of them was appointed by which state. They should be invited more often!)

The fact that dissenting arbitrators are nearly always those who have been appointed by the party aggrieved by the majority decision does not in and of itself point to a failure of ethics. It may simply be that the appointing party has made an accurate reading of how its nominee is likely to view certain propositions of law or circumstances of fact. The problem is that the inevitability of such calculations proves that unilateral appointments are inconsistent with the fundamental premise of arbitration: *mutual* confidence in arbitrators.

Of course we must live with compromises. The unilaterally nominated arbitrator is the product of realism, doubtless indispensable in a complex world of inter-communal transactions, as a way of making arbitration acceptable – though in a manner which immediately dilutes its purity.

I believe that the reasons for parties' attachment to the practice of unilateral appointments are ill-conceived. Let us consider them.

(i) “*My nominee will help me win the case.*” Putting aside the amorality of this position, it is illogical. Why assume that the other party's nominee will not be at least equally effective? By all means, if both sides understand that the co-arbitrators are to be the champions of their appointers, they should be free, in all transparency, to adopt that procedure. The result will be an expensive curiosity, namely a panel on which only the president is a true arbitrator.

But this kind of overt acceptance of “non-neutral arbitrators” – what an intolerable contradiction in terms! – is no longer accepted in the international community. So the idea that “my nominee will help me win my case” is likely to be conceived dishonestly, in the hope that the other party will foolishly play by the rules. Since other parties cannot be relied upon to be rubes, the result will be a feast of hypocrisy where the innocent are burned – and others engage in pointless charades.

One may well wonder if contract drafters think through the dynamics of three-member tribunals. Why should they assume that they can game the system more effectively than their opponent? It is surely just as plausible that the adversary's nominees would be able to bend presiding arbitrators as that one's own nominees would keep them straight. Perhaps it is all in the way one puts the question. If drafting lawyers say to their client “are you willing to give up your right to appoint an arbitrator?” the answer is likely to be a resounding *no*. But a rather different response may follow if the same question is turned around: “how would you like it if we find a way to keep the other side from appointing somebody who may

observations sur l'opinion dissidente,” *Les arbitres internationaux in Société de législation comparée* at 179-186 (2005).

turn out to be partisan and obstreperous?” That way, of course, is the reciprocal waiver the opportunity of unilateral appointment.

(ii) “*Even Homer nods, three heads are better than one, especially when the stakes are high.*” This notion is wholly irrelevant to our subject. Unilateral appointments are not needed to constitute three-member tribunals. All three may be appointed by the neutral supervisory body.

(iii) “*Parties have greater confidence in arbitrators selected for their special knowledge or skill.*” This sounds good, especially to anyone who has experienced the anguish of facing a generalist judge who has an insufficient understanding of a highly specialised legal problem. Yet the answer does not lie in unilateral appointments. It would be naïve to think that Party A will appoint an arbitrator having particular qualifications in order to make Party B feel better about the whole thing. The reality is that everything a party does once a dispute has broken out is focussed on winning. Party A may insist the dispute requires the insights of someone well versed in assessing the critical path of an engineering project, while Party B asserts that the true relevant expertise lies in the purely legal subject of fraud in the inducement under the law of Erewhon. The answer, once again, does not lie in unilateral appointments.

(iv) “*My nominee will ensure that the tribunal as a whole understands my culture.*” It is undeniable that acceptance of the mechanism of unilateral appointments on this basis may increase the likelihood of acceptance of a particular arbitral jurisdiction. Such a marketing strategy is understandable on the part of fledgling arbitral institutions. But why should *mature* institutions need such psychological struts?

The presumption seems to be that someone who understands me better will more likely influence the tribunal so that I win, which suggests that the matter has not advanced from the troublesome reason (i). It seems that this thinking cannot escape the tactic of “selling” arbitration by offering a “concession” to selfish objectives. This suggests that the parties are actually not ready to agree to arbitration at all – because each apparently insists on a “cultural” input which is to be contributed solely in the interest of one party. Teddy Roosevelt would doubtless understand.

Given the freedom to do so unilaterally, a party may find it politically impossible *not* to name one of its nationals as arbitrator. Worse, that nominee may feel subject to political pressures – whether he or she succumbs to them or fights them.

I say this: whatever may have been the need to “sell” arbitration across cultural divides in times past, it seems likely that the “clash-of-culture” theme in arbitration is vastly exaggerated in the modern world. Parties likely to subscribe to arbitration agreements do so because they have among themselves some kind of relations which are characteristic to them as a group. They therefore have significant common ground in what they expect in the resolution of disputes. Business managers from Sweden who operate in the international marketplace are likely to share more common assumptions about the objectives of contractual dispute resolution with their counterparties in Costa Rica than with other social groups in Sweden who have no reason to think about such things – say a sports club or a parent-teacher association or a labour union. It seems more than plausible that what is truly at work here is

not so much a concern about undefined cultural particularities as the simple fear of being treated as an outsider.

Now *this* is a matter of the highest importance, but unilateral appointments are more likely to exacerbate the problem than to resolve it. The real answers lie in ensuring that the arbitration process is inclusive, *so that no one is "a foreigner,"* and in enhancing the confidence both sides have in the institutions charged with the essential task of ultimately appointing truly neutral and able arbitrators.

Let us think it through. We need not be concerned with trouble-free cases that result in unanimous awards. Our approach must also work in the difficult cases, which is of course where any system is tested, and thus exposed to criticism and disaffection. Is a 2:1 decision perceived by the losing party as more legitimate than a decision by a sole arbitrator, because “three heads are better than one”? That makes no sense – quite the opposite. The losing party in a difficult case is likely to consider that it appointed a “good” arbitrator, who has somehow been outvoted by the “bad” arbitrator appointed by an unscrupulous adversary and a feckless chairman misled by the “bad” arbitrator. QED: in the eyes of the losing party, the 2:1 decision is *less* legitimate than that of a sole arbitrator in whose selection the opponent had no more and no less than an equal say.

This has nothing to do per se with the choice between a sole arbitrator and a tribunal comprising three or more arbitrators. In either case, since every possible arbitrator is chosen jointly by the parties, or is appointed by a neutral institution, each is invested with an equal measure of confidence and an equal claim to moral authority.

Not so when there are unilateral appointments. Disputants tend to be interested in one thing only: winning. They exercise their right of unilateral appointment, like everything else, with that overriding objective in view. The result is speculation about ways and means to shape a favourable tribunal, or at least to avoid a tribunal favourable to the other side – which is logically assumed to be speculating with the same fervour, and toward the same end. Forgotten is the search for an arbitrator trusted by both sides.

The only decent solution – heed this voice in the desert! – is thus that any arbitrator, no matter the size of the tribunal, should be chosen jointly or selected by a neutral body.

I do recognize that this genie – the “right” to appoint an arbitrator – cannot easily be put back into the bottle. I am ready for pragmatic solutions until my position finally prevails. Indeed there are ways of reducing contamination.

One way involves the restriction of unilateral nominations by specific contractual limitation, such as a requirement that no arbitrator may have the nationality of any party.

An even more effective mechanism, provided that it is properly conceived, may be an institutional requirement that appointments be made from a pre-existing list of qualified arbitrators. When composed judiciously by a reputable and inclusive, international body, with in-built mechanisms of monitoring and renewal, such a restricted list may have undeniable advantages as a fairly intelligent compromise. Parties may freely select any one of a number of arbitrators, but each potential nominee has been vetted by the institution and is less likely to be beholden to the appointing party.

An example is that of the international body created in 1985 as the Court of Arbitration for Sport, which has its seat in Lausanne. Most of its panels are comprised of three members. Some cases are of international notoriety, involving the disqualification of famous champions or the transfer fees of wealthy professional athletes. The parties come from all parts of the globe, and most of them are involved in such proceedings for the first time of their lives. If they were given the unfettered right to make a unilateral nomination, they would in all likelihood – out of ignorance, fear, or calculation – appoint someone unknown to anyone but themselves, and practically speaking shielded from any meaningful verification because they come from an environment wholly unfamiliar to the other participants in the process. Such appointees would have little standing with the presiding arbitrator. The result might be that the presiding arbitrator would tend to decide alone, thus defeating the purpose of three-member tribunals.

The CAS solution is to require *all* nominees to be found on a list of qualified arbitrators. It is of crucial importance that this list is lengthy and inclusive, containing names from all over the world. (In 2008, there were 267 arbitrators on the CAS list.) Any party is free to choose the arbitrator it considers the best for its case. However selfish its motives, it is restricted to this list of prequalified individuals – and it knows that the same is true for its opponent.

Other institutions have experimented with a variety of other practices, such as “blind appointments” (i.e. seeking to ensure that nominees do not know who appointed them) or any number of list procedures which have in common the feature that the initial identification of the candidate comes from the institution rather than from one party.

It may be objected that these animadversions against the practice of unilateral appointments are excessive. The world of arbitration is well used to the phenomenon, and indeed it seems that three-member tribunals generally reach unanimous decisions. Satisfactory empirical data are not at hand, but let us for the moment accept that this is so. There are still reasons for serious concern.

In the first place, unanimity is not always achieved in principled ways. The practice of unilateral appointments, like it or not, implicitly militates in favour of compromise, and indeed may be said to endorse it. The result may well be to the disadvantage of a party who is 100% right and would be fully upheld by an objective decision-maker. It may favour an unscrupulous party who has no basis to seek to reduce his debt except the perception that arbitration may let him get away with it. Moreover, this dynamic toward compromise is likely to contaminate the reasoning of the tribunal, transforming it into something more like a ritual than a record of genuine ratiocination. In other words, the practice of unilateral appointments militates against coherently and sincerely motivated awards. Since the requirement of reasons is intended to serve as a check on arbitrariness, it follows that the subversion of this requirement carries the risk that awards fail to fulfil their important legitimating function.

Secondly, although one must hope they are exceedingly rare, there have been instances of unscrupulous individuals offering, perhaps no more than implicitly, iniquitous bargains: “I will see it your way when I preside and you as co-arbitrator want a particular outcome; and I will then count on you when our roles are reversed.” In skilled and malicious hands, this process can lead to a series of unanimous awards without the slightest indication

of their wicked origin. Such practices (and the very *fear* of such practices) would disappear with the eclipse of the unilateral nominee.

It all comes down to this. The sole defence of unilateral appointments to which I have no answer is that it is a pragmatic response to an inability to trust the arbitral institution to appoint good arbitrators. "Having accepted arbitration as the lesser of several evils in a particular relationship," so the reasoning goes, "I do so with severe mental reservations. I fear that the institution will appoint a presiding arbitrator who will turn the panel into a rogue tribunal. In such circumstances, the one thing I can do is to insist on the opportunity to appoint one arbitrator whom I can trust to do his best to prevent injustice. It might not work; the two others may nonetheless ruin the process. But it is the best I can do. Now do not ask me to accept that this institution appoint all three arbitrators!"

This attitude is of course a searing indictment of the arbitral institution involved.

And so these reflections on one sensitive subject thus leads ineluctably to consideration of another, equally important and delicate matter: the standards and practices of arbitral institutions. Significant progress seems impossible if appointing authorities cannot convince disputants that their selection process is untainted by undue influence. If the only reason to tolerate the unprincipled tradition of unilateral appointment of arbitrators is that there is no better alternative, the organizations that call themselves arbitral institutions need to look at themselves and ask why it is that they are so exposed to suspicions of poor selection of arbitrators, and maybe even worse: cronyism and other forms of corruption.

Only a few arbitral institutions can make credible claims to legitimacy. The naive boasting of a constant stream of new entrants fools no one acquainted with the field. It is easy for resourceful persons to come up with a lustrous governing board comprised of apparently eminent individuals happy to lend their names to what might be a useful venture (and will cost them little if it fails).

My observations of the world of arbitration lead me to believe that many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them. Others cannot get away from features of cronyism which were their *raison d'être* in the first place. We would hardly entrust the preparation of a penal code to Ali Baba and the 40 thieves. Nor are we likely to think much of the joint study prepared by "international experts", commissioned by Henry VIII in the 1530s in order to demonstrate his right to disobey Pope Clement's edict and to divorce Catherine of Aragon, thus declaring the royal supremacy of the Church in England. We want to know who pulls the strings and who pays the piper. Some arbitral institutions have existed long enough, and have a sufficient track record, to be trusted by broad segments of relevant users of their services. But new entrants are another story. What is one to think of arbitral panels limited to persons chosen by manufacturers who then insist on the exclusive authority of such "arbitrators" as a term of consumer sales? Or arbitral institutions established by and financed by a government, controlled by its Ministry of Justice, and insisted upon as a condition of tender for public contracts? Or institutions created with the sole *raison d'être* that a small group of would-be arbitrators have taken a dislike to an existing institution around the corner because it does not give *them* sufficient appointments?

When such defects are uncovered, it also becomes more difficult for well-established and punctilious institutions to seek credence. Unless this matter is given proper attention, my proposal that we turn our backs on the practice of unilateral appointments is not going to get very far. So how do we enhance and protect the legitimacy of decent institutions? That is a long story, filled with important but tedious detail – and must, you may be happy to learn, be left for another day.

Thank you once more for your attendance and kind attention.